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Supreme Court of the United States

OCTOBER TERM 1939

No. 40

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF FOR APPELLANT

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TABLE OF CASES CITED

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REPLY BRIEF FOR APPELLANT

Three briefs have been filed by the appellees: one by the Government and the Commission jointly, one by the Railroad intervenors, and one by the Livestock Association intervenor.

At the outset of its argument it is stated in the Railroad brief that the single question presented is whether the loading and unloading service in question—

> "* * * is performed by the appellant as a common carrier and subject, as such, to the provisions of the Act, or is performed in a strictly private capacity, and, therefore, not subject to the provisions of the Act." (Railroad Brief, p. 11)

This is an erroneous statement of the question presented. The appellant is not a private corporation but a public utility, and the primary question presented is whether

the charges of all public stockyards—of which the appellant is but one—for the loading and unloading of livestock at their yards are subject to the jurisdiction of the Secretary of Agriculture or the Commission.

The record does not disclose that the appellant occupies any particular status peculiar to itself and distinguishable from that of other public stockyards loading and unloading livestock. The Commission declined to receive evidence proffered by the appellant that it does not. In our opening brief we pointed out that there are no facts or circumstances which distinguish the appellant from other public stockyards loading and unloading livestock or from other persons or corporations performing transportation services, as agent of the carriers, by reason whereof the appellant is subject to the jurisdiction of the Commission and such others are not. (Opening Brief II, pp. 69-91)

The question is not whether the service performed is a transportation service as defined in the Interstate Commerce Act performed through the use of facilities defined as railroad facilities by that Act; whether the carriers are required, by reason of the circumstances surrounding the receipt and delivery of livestock at Chicago, to employ the appellant as their agent for the performance of the service in question; or whether the appellant holds itself out to perform this service as such agent—but whether the appellant is a common carrier. If not, its charges are not subject to the jurisdiction of the Commission any more than are those of any other person performing transportation services as a carrier's agent, whether through the use of facilities defined by the Act as railroad facilities or not. (Opening Brief, pp. 47-51)

I.

THE ARGUMENT THAT THE APPELLANT IS A COMMON CARRIER BECAUSE IT IS PERFORMING SERVICES WITHIN THE DEFINITION OF "TRANSPORTATION" THROUGH THE USE OF FACILITIES WITHIN THE DEFINITION OF "RAILROAD."

All of the appellees place primary reliance upon the definitions of "transportation" and "railroad" as contained in the Act. None of the appellees contends that the appellant is a common carrier within the ordinary meaning of that term. As pointed out in our opening brief, a person who is not a common carrier—within the ordinary meaning of the term—is not made one by the performance, as agent of the common carrier, of transportation services through the use of facilities defined in the Act as railroad facilities, as this Court and the Commission have held. (Opening Brief, pp. 47-51) That such was not the intent of the Act is disclosed by its legislative history (Opening Brief, pp. 51-59), and by the far-reaching consequences of a contrary interpretation. (Opening Brief, pp. 59-62)

Appellees would distinguish the status of the appellant from other agents performing services defined as "transportation" through the use of facilities embraced within the definition of the word "railroad" upon several grounds.

1. The monopoly argument.

First it is said that, by reason of the circumstances surrounding the receipt and delivery of livestock, the carriers are required to employ the services and facilities of the appellant in the loading and unloading of such stock. The

same is true where the carrier employs an elevator company, a wharfage company, a bridge company, a ferry company and many other persons performing services within the definition of "transportation," or furnishing facilities within the definition of "railroad." It is a matter of common knowledge that there is seldom more than one grain elevator in most communities and that at many ports there is but one public wharf, but it has never been held that either is a common carrier because it has a monopoly of the facilities and service necessary to commence or complete the transportation service required to be performed by the railroads where it supplies such facilities and service as the carriers' agent. (See discussion of *Munn* v. *Illinois*, p. 5 *post*.)

2. The holding out argument.

It is said that appellant holds itself out to perform loading and unloading service and on this account has become a common carrier. The tariff of appellant on file with the Commission,* however, states that the service is to be performed only "as a carrier's agent." (R. 16), and as was said in *Adams* v. *Mills*, 286 U. S. 397, 415:

> "* * * the tariff, as published, authorized only the collection of the charge as a carrier's agent."

Moreover, while such holding out may make the appellant a public utility subject to regulation, it does not make it a common carrier. It is a public utility. As such

*The tariff is filed with the Commission under compulsion of its decisions, the most recent, prior to the present case, being the case decided in 1935. (R. 23, 31)

it is subject to public regulation. This would be so whether it held itself out to perform the service for the shipper, or for the carrier and as its agent. The Act, however, does not give the Commission jurisdiction over all public utilities, but only over those which are common carriers.

Reference is made to the statement in *Stafford* v. *Wallace*, 258 U. S. 495, that a public stockyard is "an interstate commerce agency"; but this Court did not say that it was a common carrier, and its observation was made in support of the more general statement that a public stockyard was a public utility and, as such, subject to regulation. That such a yard is a public utility was held long ago as *Cotting* v. *Kansas City Stock Yards Co.*, 82 Fed. 839, 183 U. S. 79, but as pointed out by this Court in that case it is "not a common carrier."* (Opening Brief, pp. 40-41) The fact that loading and unloading service is performed, as agent of the carriers, by another public utility (not itself a common carrier) lends no support to the argument that such utility is a common carrier subject to the jurisdiction of the Commission.

In *Munn* v. *Illinois*, 94 U. S. 113, grain elevators were held to be engaged in a business affected with the public interest—but not common carriers—because they were intimately connected with the rail transportation system and had a virtual monopoly. If appellant is a common carrier, a public grain elevator and a public wharfinger must also be common carriers; for under the Act the status of companies performing incidental transportation services for railroads is the same. (Opening Brief, pp. 50-51, 59-62)

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*See also *Nebbia* v. *New York*, 291 U. S. 502, 536.

3. The integral part of the service and facilities argument.

It is said that the facilities provided by appellant are an integral part of the terminal facilities of the carriers and that the service performed is an integral part of their transportation service. This is true whenever the carrier performs any of the sevices required of it through an agent and the use of the agent's facilities. For example, a carrier may employ the services of a warehouseman in connection with the receipt and delivery of freight. *United States* v. *B. & O. Railroad,* 231 U. S. 274; *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501. Such employment involves both the performance of services within the definition of "transportation" and the use of facilities within the definition of "railroad," but the warehouseman does not thereby become a common carrier.

Such employment may not be used as a cloak for payment of rebates through allowances to the owner (cases *supra*), and such allowances are subject to the jurisdiction of the Commission if made in connection with property owned by the warehouseman—not because the warehouseman is a common carrier, but because allowances to the owners of property transported have been placed within the jurisdiction of the Commission by Section 15 (13) of the Act in order to prevent the payment of indirect rebates. (Opening Brief, pp. 38, 50-51; 62)

A carrier may make a public stockyards its depot for the receipt and delivery of livestock (*Central Stock Yards* v. *L. & N. Ry. Co.,* 192 U. S. 568), but the stockyards company does not thereby become a common carrier, although its yards become an integral part of the carrier's terminal

facilities. Carriers may thus designate non-carrier owned facilities as their terminal, but the owners thereof do not become common carriers even though they perform therein a part of the transportation services of the carrier. (See cases *supra*, and also views of Mr. Commissioner Porter, R. 50-54.)

Reference is made by appellees to *United States* v. *Brooklyn Eastern District Terminal Co.*, 249 U. S. 296; *McNamara* v. *Washington Terminal Co.*, 37 App. D. C. 384; *McCabe* v. *Boston Terminal Co.*, 22 N. E. (2d) 33; *United States* v. *Atlanta Terminal Co.*, 260 Fed. 779; *Bordelon* v. *New Orleans Terminal Co.*, 14 La. App. 60; and *Spaw* v. *Kansas City Terminal Ry. Co.*, 198 Mo. App. 127. In each of these cases the defendant, a terminal company in a large city, operated and controlled a freight terminal or union station to which the public resorted.

In *United States* v. *Brooklyn Eastern District Terminal Co., supra*, it appeared that the Terminal Company was itself engaged in transporting property by means of car floats and also by means of locomotives operated by it. It was in that case that this Court held that whether a corporation was a common carrier was to be determined by what it did and not by what it was empowered to do. (Opening Brief, p. 77)

In the *McNamara* case the stock of the Terminal Company was owned entirely by two trunk-line railroads. It was thus operated in conjunction and affiliation with an interstate system of transportation, as in the case of the terminal in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, and as in the case of appellant at the time of the decision in *United States* v. *Union Stock Yard*, 226 U. S. 286. Whether the same was

true in the other cases cited does not appear, but it is a matter of common knowledge that terminal companies in our large cities are so owned and operated. In the *McNamara* case the Terminal Company had complete and exclusive control over the operations of the trains and shifted cars and made up trains with its own engines.

In *McCabe* v. *Boston Terminal Co.; supra,* the Terminal Company directed and controlled the movement of all trains, and the crews of the railroads using the station were required to obey its directions; it owned and operated the signals and switches, and was "in direct charge of all transportation occurring upon its premises." In *United States* v. *Atlanta Terminal Co., supra,* it was stipulated, without elaboration as to the facts, that the "movement [of trains] in the station or station grounds is under the direction and control of the Terminal Company station masters." In *Spaw* v. *Kansas City Terminal Ry. Co., supra,* the plaintiff was the general yardmaster of the Terminal Company and "his duties included the supervisory charge of the operation of all trains using the Terminal Company's tracks, the direction of affairs following wrecks and accidents thereon, including the clearing of the tracks, so that general traffic would not be hindered or obstructed." In *Bordelon* v. *New Orleans Terminal Co., supra,* the manner of operation is not disclosed, but the case turned upon a failure to meet a burden of proof imposed by state law.

As appears from the footnote on page 4 of the Railroad Brief, in connection with outbound shipments, the loading foreman of the appellant and a joint agent of the railroads merely "decide at which chutes the respective cars should be placed for loading," and as to inbound shipments, all that the appellant does is "gives information as to which

platform train will be unloaded." In so doing, the appellant does no more than is done by every large industrial plant having several loading or unloading tracks or platforms, and whose representative informs the railroad company as to which place cars should be spotted for loading or unloading—but this does not convert the owner of such industrial plant into a common carrier. Appellant has no control over tracks, which are under the control of the River Road, or over the trains or crews. The situation is thus wholly unlike cases of terminal companies which control the tracks and train operations thereover: (See views of Mr. Commissioner Porter, R. 53-54.)

4. Appellees have completely failed to distinguish the rule in the *Ellis* case.

Judged by what it does, the appellant is not a common carrier unless every person performing transportation services for a railroad as agent for a carrier becomes such. On this point *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, and *United States* v. *Interstate Commerce Commission*, 265 U. S. 292, are controlling.

The appellees have failed completely to distinguish these cases. The only ground upon which they are sought to be distinguished in either brief is that the carriers are required to employ the services of the stockyards company for the loading and unloading of livestock, while in respect of private cars they may furnish the cars themselves or secure them from others. Since livestock is consigned to and from the stockyards, unloading and loading must necessarily be performed within the yards, just as loading and unloading of carload freight consigned to and from industrial establishments must be loaded and unloaded thereat.

Moreover, the premise upon which the attempted distinction rests is without foundation in fact. When the amendments out of which *Ellis* v. *Interstate Commerce Commission* arose were enacted, it is a matter of common knowledge that few, if any, carriers owned any refrigerator equipment, and it is believed that few own any today. As a practical matter they were, therefore, compelled to employ the refrigerator cars of private car lines, and most of them have continued to do so ever since. Theoretically, each carrier could have provided itself with the necessary equipment, but this would have been expensive and wasteful because of the seasonal character of perishable freight originating in one part of the country on the lines of one carrier or one set of carriers at one season of the year, and on the lines of others at other seasons. From a practical standpoint, carriers are as much required to use the equipment and service of private car lines in the handling of refrigerated traffic as they are to use the services and facilities of the appellant in the handling of livestock shipments to and from Chicago.

Finally, as we have previously stated, carriers at most places are required to use the services and facilities of elevator operators and wharfingers and the facilities of bridge companies, although perhaps theoretically they could provide their own. As is pointed out in our opening brief (pp. 50-51), the allowances made to elevators are perhaps the most complete analogy to the situation presented here. The elevation of grain is a transportation service as defined by the Act, and the elevator itself is included within the definition of a railroad; yet it has never been contended that the elevator operator is a common carrier. If he is

the owner of grain passing through his elevator, the allowances made to him for that service are within the jurisdiction of the Commission under Section 15 (13) in order to avoid indirect rebating; but, as held by the Commission itself, where he is not such an owner, the Commission has no jurisdiction over the payments made to him by the railroad for the services performed. *Keystone Elevator & Warehouse Co.* v. *Director-General*, 73 I. C. C. 273. (See also views of Commissioners Eastman and Porter quoted in our Opening Brief, pp. 17-18, 22-23.)

Appellees have completely failed to point out any distinction between the status of the appellant and that of any other person performing transportation services as the agent of the carrier, whether through the use of service or facilities within the definition of the terms "transportation" or "railroad" or not.

II.

THE ARGUMENT BASED ON SECTION 15 (5).

It is believed that the arguments of the appellees in so far as based on this section are completely anticipated and answered by our opening brief. (I, 6, pp. 63-69) This section neither in terms confers jurisdiction upon the Commission to determine the loading and unloading charges made by a stockyard for services performed as the agent of the carrier nor provides that such stockyard company becomes a common carrier by their performance. On the contrary, it forbids the making of any charge whatever to the shippers at whose instance it was said to have been

passed. As pointed out, its purpose was not to protect the railroad company against the exaction of an exorbitant charge at the hands of a stockyards company, but to require the railroad company to perform loading and unloading service, whether by itself or through an agent, without the making of any additional charge therefor.

That such was its purpose appears upon the face of the amendment itself and from its legislative history. As pointed out by Mr. Justice Stone in his dissenting opinion in *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193, it was enacted for the protection of the shipper so as to require that all services in connection with the transportation of livestock to and from public stockyards, including their loading and unloading should be performed by the railroad at a single rate. Congress did not concern itself with the charge to be made by the stockyards company to the railroad. It is said the shipper pays such charge. He does not, any more than he pays the cost of labor, rails, materials and fuel which enter into the cost of transportation. Congress might have specifically provided that payments by the railroad should be subject to the jurisdiction of the Commission, but it did not do so.

If a public stockyards, such as appellant, be held to be a common carrier it must be by some other provision of the Act than this. The character of the service performed and the status of the company performing it was not changed by this section. If a public stockyard loading and unloading livestock is a common carrier, it was such before the passage of this amendment. If it was not one then, it was not made one thereby.

III.

THE ARGUMENT THAT THE PURPOSES OF THE ACT WILL BE DEFEATED UNLESS THE APPELLANT BE HELD TO BE A COMMON CARRIER.

The railroads in their brief exhibit great apprehension that unless the appellant be held to be a common carrier the Government or the Commission will be unable to compel the performance by them of the duties imposed upon them by the Act. The Act makes it the duty of the railroads to transport livestock, as well as all other kinds of freight, upon request, and, in the case of livestock shipments to and from public stockyards, to provide for the loading and unloading thereof without extra charge.

The duty to furnish transportation upon request existed at common law, and the duty to provide for the loading and unloading of livestock at the public stockyards in Chicago without additional charge existed by reason of common usage prior to the enactment of Section 15 (5). *Atchison, T. & S. F. Ry. Co.* v. *United States, supra.* The performance of these duties, if refused, may be enforced by mandamus or other appropriate process. But the railroads say that they are compelled in the performance of these duties to make use of the facilities of the appellant (and presumably of other public stockyards) and that "Unless there is direct jurisdiction of appellant under the Act, appellant has an absolute veto power over the great movement of livestock to and from the public stockyards at Chicago." The railroads thus paint the picture of a possible and complete stoppage of such shipments because of the refusal of the appellant to perform as agent for the railroads those services which they are unable to perform for themselves.

Quite aside from the fact that if the appellant or any other public stockyards should assume such an attitude it would destroy its own business, the argument overlooks the fact that at common law a public stockyards was itself a public utility required to furnish service upon request and at reasonable rates. (Opening Brief, pp. 40-44, 101-102) That duty has now been made statutory, and its charges for all of its services, including those provided in connection with the "receiving * * * holding, delivery, shipment * * * or handling in commerce of livestock" have been placed under the jurisdiction of the Secretary of Agriculture. (7 U. S. C. secs. 201, 205, 206)*

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*At various places in their brief the railroads criticise appellant for attempts to increase its charges. (See, *e.g.*, Railroad Brief, p. 27) We have always understood that the motive of a litigant is legally immaterial. *Gregory* v. *Helvering*, 293 U. S. 465, 469; *U. S.* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269. The Examiner himself inquired into the matter of appellant's motives and charges; but when appellant sought to show a recent decline in its revenue and its need for more income the Examiner, on objection of counsel for the railroads, refused to receive the testimony unless appellant would furnish information which the Examiner had previously ruled immaterial. (See Opening Brief, pp. 118-119.) Quite aside from the legal inconsequence of motive, the motives of appellant are not in fact improper. The record shows that its receipts of animals declined from 18,653,539 in 1924 to 9,621,640 in 1936. (R. 735) Appellant has sought to secure some of this needed revenue by increasing yardage and other charges paid by the owners of livestock (R. 330-331), and likewise expects the railroads to pay a fair amount for the extensive facilities and service which it furnishes to them.

IV.

PRIOR DECISIONS OF THIS COURT RELIED UPON BY THE APPELLEES.

United States v. *Union Stock Yard,* 226 U. S. 286, is fully reviewed and analyzed in our opening brief. (II, 1, 2, 3, pp. 69-88)

While *Adams* v. *Mills,* 286 U. S. 397, was not decided until 1932, the charges to which it related were collected between December, 1917, and February, 1920 (286 U. S. at 405), prior to the lease to the New York Central subsidiary in 1922, which destroyed the conjunction in ownership, operation and service between the appellant and an operating railroad company. Under the 1913 lease in effect at the time of the movement of the shipments, appellant received a flat rental from its railroad affiliate and not a division of earnings theretofore in effect. Although in the proceeding before the Commission appellant had contended that by reason of this change the decision in *United States* v. *Union Stock Yard, supra,* was no longer applicable and that it was not a common carrier, the point was not made in this Court, nor was it considered or decided by it. As said by Mr. Commissioner Eastman:

> "Past decisions of the Supreme Court that it [*i.e.,* appellant] was such a carrier rested upon its conjunction in ownership, operation, and service with a line of railroad. Such conjunction ceased when the line of railroad was leased, practically in perpetuity, to the New York Central." (R. 43)

We believe the interpretation placed upon the decision in *United States* v. *Union Stock Yard, supra,* by Commis-

sioner Eastman to be a correct one. If not, then the decision is clearly irreconcilable with the subsequent decisions in *Ellis* v. *Interstate Commerce Commission, supra,* and *United States* v. *Interstate Commerce Commission, supra.*

Atchison, T. & S. F. Ry. Co. v. *United States,* 295 U. S. 193, known as the *Hygrade* case, upon which appellees lay great stress, is reviewed in our opening brief. (III, pp. 99-100) While in the *Hygrade* case the appellant contended that under the conditions existing since the lease of 1922 it was not a common carrier subject to the jurisdiction of the Commission (R. 701-708), the point was neither decided by this Court nor necessary to the decision rendered. Mr. Justice Stone stated at the conclusion of his dissenting opinion:

> "In the present state of the case it is unnecessary to consider whether the reparations part of the order was rightly directed to both the stock yards and the carriers, or should have been directed to the carriers alone."

Thus neither the majority nor minority expressed any opinion as to whether the stockyard company was a common carrier against which an order to make reparation might run.

Appellees rely upon the statement in the majority opinion that—

> "The statutes cited clearly disclose intention that the jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends."

The appellees construe this as equivalent to a statement that the Commission has jurisdiction over the charges which the stockyards company makes for the performance of the

loading and unloading service, and that the jurisdiction of the Secretary of Agriculture is confined to the other charges which it makes. We do not so construe it. (Opening Brief, pp. 99-100) The Commission unquestionably has jurisdiction over the railroads. If they fail to provide loading and unloading service themselves or through an agent without extra charge, they will have violated the law to which the Commission may require them to conform. It does not follow that the charges made by the stockyards company to the railroad company for the performance of this service are subject to the Commission's jurisdiction. If the Court intended so to indicate, then the statement is clearly dictum and a dictum irreconcilable with *Ellis* v. *Interstate Commerce Commission, supra,* and *United States* v. *Interstate Commerce Commission, supra.*

The statement in the majority opinion upon which appellees rely is completely explained by the fact that the Court was speaking from the standpoint of the shipper or consignee of the livestock, and was not passing upon the question whether the Commission had jurisdiction of payments made by railroads to a stockyard company employed by them to perform a service owed by them to the shipper or consignee. As Mr. Commissioner Eastman stated:

> "* * * although the law has made the loading and unloading of the livestock a duty of the railroads, it is a duty which must be performed, when the livestock is delivered to or received from a public stockyards, through the agency of those who are in charge of the stockyards, because it is essentially a part of the stockyards service.
>
> "While this may seem to be an anomalous situation, it is one which need give rise to no overlapping of jurisdictions or difficulties of administration. *So*

> *far as the shippers are concerned, the loading or unloading of the livestock is a railroad service the compensation for which must ordinarily be included in the line-haul rates, and we have full jurisdiction over those rates, and also over any separate charges which the railroads may at times assess for the service. So far as the railroads are concerned, the loading or unloading is a service which must be performed for them, at a public stockyards, by those in charge of the stockyards, because it is an inextricable part of stockyards service.* It follows, therefore, that the charges made against the railroads for such service at a public stockyards are subject to the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act." (Italics ours; R. 44-45)

Denver Union Stock Yard Co. v. *United States,* 304 U. S. 470, is discussed in our opening brief. (III, pp. 99-101) As is pointed out, since the loading and unloading service was not covered by the order of the Secretary of Agriculture fixing rates, the stockyard company had no constitutional right to have the facilities included in the rate base. That is all that was decided by this Court. Whether in refraining from fixing any charges for the loading and unloading service the Secretary erroneously followed the interpretation placed upon the Packers and Stockyards Act by the Interstate Commerce Commission is immaterial. Since he did not fix them, the value of the facilities employed in such service was clearly properly excluded from the rate base.

We think it is plain that the decision in *United States* v. *Union Stock Yard, supra,* is no longer controlling since

the factual foundation therefor has ceased to exist, and that the question of appellant's status was not raised or decided in *Adams* v. *Mills, supra.* We also think the appellees have misapprehended what was in reality decided in the *Hygrade* and *Denver* cases. If, however, the statements relied upon in those cases are to be interpreted as they have been interpreted by the appellees, then it is respectfully submitted that by reason of the irreconcilable conflict between such interpretation and the decisions in *Ellis* v. *Interstate Commerce Commission, supra,* and *United States* v. *Interstate Commerce Commission, supra,* the question should be reconsidered in the light of the provisions of the Interstate Commerce Act relied on and their legislative history. So considered, it is, we think, plain that neither the appellant nor any other public stockyards, any more than any other agent performing transportation services for the railroads, is a common carrier.*

*The railroads mention the fact that appellant has in the past invoked the processes of the Interstate Commerce Act for the purpose of increasing its charges (Railroad Brief, pp. 35, 40). The fact is that appellant invoked the jurisdiction of the Commission under legal and economic compulsion. (R. 288, 290) Even if the facts were otherwise, jurisdiction of subject-matter could not be conferred upon the Commission by any action of appellant, nor could the right of appellant to raise the question be waived by prior inconsistent conduct. *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 475; *Lambdin* v. *Commerce Commission,* 352 Ill. 104, 185 N. E. 221, 222; *Malina* v. *Oplatka,* 304 Ill. 381, 136 N. E. 666, 668; *Union Indemnity Co.* v. *Railroad Commission,* 187 Wis. 528, 205 N. W. 492, 496; *Great Lakes Stages* v. *Public Utilities Commission,* 120 Ohio St. 491, 166 N. E. 404, 406.

V.

THE JURISDICTION OF THE SECRETARY OF AGRICULTURE.

Appellees assert that Section 406(a) of the Packers and Stockyards Act (7 U. S. C. sec. 226) preserves jurisdiction of the Commission over loading and unloading service. The railroads go so far as to assert that this section "is clear legislative recognition that Congress had already given the Commission jurisdiction over stockyard owners with respect to certain matters, which jurisdiction it did not intend to disturb," and that "Jurisdiction over the loading and unloading services and charges is the only jurisdiction of the Commission *over stockyards* to which Section 406 of the Packers and Stockyards Act could have referred." The railroads thus contend that any public stockyard company which performs loading and unloading service is subject to the jurisdiction of the Commission.

Section 406(a) contains no mention of stockyards. The Interstate Commerce Act, with exceptions here immaterial, applies only to common carriers engaged in transporting persons or property from place to place by rail. The only purpose of Section 406(a) was to preserve the existing powers of the Commission over common carriers by rail. Congress did not want the railroads to be in position to contend that the duty imposed upon them by Section 15(5) of the Interstate Commerce Act to load and unload livestock at public stockyards without extra charge to the shipper had been impliedly repealed by the Packers and

Stockyards Act. If Section 406(a) had not been included in the latter Act, the railroads would have been in a position to contend that they had no obligation at public yards beyond the placing of their cars at the loading and unloading docks.

Reference is made by the railroads to certain bills introduced in Congress in 1937, the purpose of which, they assert, "was to transfer jurisdiction of the loading and unloading services performed by stockyards companies from the Interstate Commerce Commission to the Secretary of Agriculture."* As we read the bills, their purpose was merely to clarify the existing law; but, in any event, they do not amount to a Congressional recognition of any jurisdiction in the Commission over loading and unloading because neither of them was ever enacted.

Although vigorously supporting the rulings of the Examiner which prevented appellant from showing that the Department of Agriculture has for many years received stockyard tariffs naming loading and unloading charges, and that the railroads, including those before this Court, have paid the charges in such tariffs without question (R. 169-170), the railroads (on p. 54 of their Brief) cite a letter of the Secretary set forth in the record of the hearings of a Sub-Committee of the Senate in order to show the current view of the present Secretary of Agriculture. The letter indicates quite clearly a misunderstanding of the effect of Section 15(5) of the Interstate Commerce Act

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*The railroads here admit that other stockyard companies perform loading and unloading services. (Railroad Brief, p. 53.)

and of the decision of this Court in *Atchison, T. & S. F. Ry. Co.* v. *United States, supra,* the so-called *Hygrade* case.*

In support of their contention that the Commission has exclusive jurisdiction over appellant's loading and unloading service, the railroads argue that under appellant's theory there would be dual jurisdiction of the Commission and the Secretary over the service, and that administrative conflict and confusion would be inevitable. They assert that an order by the Commission against the trunk-lines would be wholly nugatory because they would not be able to make it effective; that, if the Commission found that the requirements of the Interstate Commerce Act were not being satisfied, proceedings against appellant would have to be instituted before the Secretary; and that the rights of shippers under the Interstate Commerce Act might be found to be different from what appellant was required to furnish under the Packers and Stockyards Act. Section 15 (5) of the Interstate Commerce Act does not prescribe the manner in which the service shall be rendered. All the carrier is required to do is to load and unload without extra charge to the shipper. The situation is no different from that obtaining in states where public elevators and public wharfingers are regulated; the Interstate Commerce Commission regulates the relation between the railroad and the shipper and the state agency the relation between the railroad and the elevator or wharfinger.

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*The letter states that loading and unloading are actually performed for the railroads by the stockyards, a fact which, as we have previously pointed out, the railroads now admit. In *St. Joseph Stock Yards Co. v. United States,* 298 U. S. 38, 67, it would seem that the Secretary investigated but made no change in loading and unloading charges.

The regulation of loading and unloading charges by the Commission and of other stockyard charges by the Secretary would be impracticable, and would subject all stockyards to dual regulation by the Commission and the Secretary of Agriculture, as is the present situation in the case of appellant. The value of facilities (*e.g.*, general office building, pens and alleys) employed in serving railroad as well as non-railroad patrons must be apportioned between the two classes of patrons. General overhead expenses incurred in serving both classes of patrons (such as salaries of officers and clerical force and wages of stock handlers and watchmen) must also be properly divided. Livestock does not arrive at the yards in an even stream, and a large force must be kept on hand at all hours of the day and night, prepared to handle whatever quantity may arrive. (R. 250-251, 258) In connection with the cost of labor alone, a difficult problem arises in the apportioning of idle time as between railroad and non-railroad customers. The Secretary, who now actively regulates most of appellant's activities (R. 417-418), is in a better position than the Commission to view the picture as a whole and make the proper allocations of value and expenses. If appellant were subject to the dual jurisdiction of the Commission and the Secretary and each regulatory agency should institute a rate proceeding in which identical records were made, the Commission and the Secretary in their respective proceedings might reach different conclusions as to the allocation of value and expenses, and their respective orders conceivably might be upheld by the courts in separate court proceedings, if supported by substantial evidence, even though the allocations made in the two cases resulted in no allowance to appellant for part of the idle time on labor.

If the Commission had jurisdiction over loading and unloading charges of public stockyards, the Commission would have exclusive jurisdiction over their accounts, and they would be unable to keep any accounts, records or memoranda other than those prescribed or approved by the Commission. (Opening Brief, p. 61) The jurisdiction of the Secretary over the accounts, records and memoranda of public stockyards conferred in Section 401 of the Packers and Stockyards Act would be rendered nugatory. (7 U. S. C. sec. 221) The very fact that Congress gave the Secretary jurisdiction over accounting matters of stockyard companies indicates quite clearly that it did not intend Section 406(a) should be construed to mean that the loading and unloading service of stockyards should be subject to the jurisdiction of the Commission; for Congress was presumably aware of the decision of this Court in *Interstate Commerce Commission* v. *Goodrich Transportation Co.*, 224 U. S. 194, where it was held that the Commission had exclusive jurisdiction over the non-carrier as well as carrier accounts of a company which was engaged in common carriage. The record shows in detail many of the intricate records and memoranda which a public stockyard must keep in order to maintain a proper record of transactions and activities. (R. 577-600) Appellant is now confronted with the difficulty presented by the fact that the Commission and the Secretary do not agree as to the records it should keep. (R. 418)

The railroads' theory, moreover, disregards intrastate shipments. In states such as Illinois where there is no statutory provision corresponding to Section 15 (5) of the Interstate Commerce Act, the loading and unloading charges on intrastate shipments would be subject to no

regulation. Under appellant's theory, intrastate shipments from and to public stockyards would be subject to the jurisdiction of the Secretary of Agriculture because they are part of a stream of interstate commerce. *Stafford* v. *Wallace*, 258 U. S. 495.

Commissioner Eastman, who has had many years of experience in the field of regulation and may be presumed to know more about the subject than counsel for the railroads, was of the opinion that from an administrative standpoint the construction of the Acts urged by appellant "would simplify matters, in comparison with the situation which will result from the decision of the majority." (R. 45)

VI.

THE HEARING ACCORDED BY THE COMMISSION.

In an effort to divert attention from the real issue, the railroads argue that appellant attempted to force the Commission to undertake a sweeping, nation-wide investigation and determine the status of 135 other public stockyard companies and the status of other companies engaged in performing services for railroads. The status of these companies, of course, could only be determined in proceedings in which they were parties. Appellant did not request the Commission to enter into any such investigation. What appellant attempted to show was the practical construction of the Act by the Commission, the railroads, and public stockyard companies throughout the country. Appellant had the evidence and was prepared to introduce it, and no order entered by the Commission could have judicially or quasi-judicially determined the status of companies not before it.

Since the record shows the general nature and purpose of the evidence which appellant sought to introduce, it is argued by appellees that a full hearing was granted. The law is clear, however, that a litigant has a right to make offers of proof, and that such offers must be specific. (See authorities cited in footnote on p. 114 of Opening Brief.) If appellant had made a general statement of the evidence it wished to offer, as the Examiner suggested, it would probably now be confronted with a contention that the statement failed to show precisely the facts which it sought to prove.

The rulings of the Examiner cannot be sustained on the ground that at most the evidence would have tended to show that there were other stockyards which had not observed the law, as appellees suggest. The evidence was designed to show that the Commission throughout the years, with knowledge of the facts, had correctly construed the Act as not applicable to public stockyard companies by not requiring them to observe it. (R. 178) The Commission is required by Section 12 of the Act to execute and enforce its provisions, and its failure to do so in the case of 135 other public stockyards, as appellant wished to show, amounted to a practical interpretation of the Act as not applicable to such yards.

The railroads assert appellant did not seek to show a uniform practice or interpretation, and could not have done so because the Commission had in fact applied the Act to appellant. The rule that the practical construction of a statute whose meaning or application is doubtful shall be given great weight does not require a showing of absolute uniformity in practice. If appellant had been permitted to do so, it would have shown that the practice has been uniform in respect of 135 other public stockyards, and that

appellant is the only public stockyard in the country which the Commission has required to file tariffs covering loading and unloading service. (R. 178)

In a further effort to justify the conduct of the Examiner, the railroads state that appellant in its brief claims it was not permitted to have its excluded exhibits marked for identification and that this statement is untrue. The statement ascribed to appellant is not the one made in the brief. In that document appellant contended that the Examiner arbitrarily refused to permit it *"to have the reporter* mark for identification or to offer exhibits the Examiner conceived to be irrelevant or immaterial." (Opening Brief, p. 104). When the excerpt from the record quoted by the railroads is carefully read in connection with portions they did not quote, it will be seen that the Examiner would not permit appellant to have the reporter mark the exhibits with identification numbers for the record, that he would not permit appellant to offer them in evidence, and that he offered to allow appellant to put some private unofficial marks on the exhibits for the purpose of arguing their admissibility and mailing them to the Commission with any petition that appellant might wish to file.* (R. 540-543, 548-550, 570)

A litigant has the right to have the reporter mark exhibits for identification without even asking permission of

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*The railroads apparently seek to convey the impression that appellant does not seriously question these rulings of the Examiner because of the fact that it did not submit the exhibits with its petition to the Commission, but merely offered to file them. (Railroad Brief, p. 77) This was due to the fact that counsel discovered that the rules of the Commission only permitted a petition containing a brief statement of the nature and purpose of the evidence sought to be adduced. (R. 198-199, 737)

the Examiner. After the exhibit has been so marked, the litigant has the right to establish its authenticity (if it is not certified) by a witness with knowledge, and after its authenticity is established, he has the right to offer it in evidence. The Examiner is then called upon to rule whether the exhibit will or will not be received in evidence, and if it is not admitted it should remain in the record as a rejected exhibit in order that the Commission and the courts may determine whether the Examiner erred in refusing to receive it in evidence. (See authorities cited in footnote on p. 114 of appellant's brief.)

An attempt is made by the railroads to justify the Examiner's arbitrary conduct in inquiring into the question whether appellant was sponsoring certain bills before Congress and proposing to increase its charges. Obviously, these matters had nothing to do with the issue whether appellant was or was not a common carrier.

The final contention made by the railroads is that the excerpt from certain statements of the Examiner quoted in a footnote on page 115 of appellant's brief would be more enlightening if the entire discussion had been quoted, and it is said that the colloquy in question ensued when it was discovered that certain data held inadmissible had nevertheless been physically incorporated in the record. Appellant made it clear at the beginning of the quotation referred to that the colloquy related to certain pages of "an exhibit for identification." (Opening Brief, p. 115, footnote; R. 565) The portions of the exhibit referred to had not as yet been offered, but had merely been marked for identification.* Counsel for the railroads are apparently under the

*The Examiner had only received in evidence the portions of the exhibit (a group of rate tariffs) which showed rates on livestock to Chicago. (R. 486)

impression (as the Examiner himself may have been) that an exhibit merely marked for identification somehow becomes a part of the record as evidence. This is not the law. (See footnote 9 on p. 116 of Appellant's Brief.)

CONCLUSION

It is respectfully submitted that appellees have not answered the contentions in our main brief.

Respectfully submitted,

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